



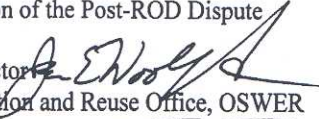
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

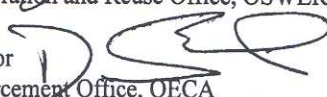
NOV 25 2003

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidance on the Resolution of the Post-ROD Dispute

FROM: James E. Woolford, Director   
Federal Facilities Restoration and Reuse Office, OSWER

David J. Kling, Director   
Federal Facilities Enforcement Office, OECA

TO: Superfund National Program Managers, Regions 1 - 10  
Office of Regional Counsel, Regions 1-10

The purpose of this memorandum is to confirm the resolution of the post- Record of Decision (ROD) dispute as described in the October 2, 2003 letter from Raymond Dubois, Jr., Deputy Under Secretary of Defense (Installations & Environment) and confirmed by Marianne Horinko, Acting Administrator for EPA on October 24, 2003, and to provide guidelines for implementation of this resolution. (See Attachments 1 and 2 for the letters). Regions should begin discussions immediately, resources permitting, with the Services on RODs and other documents that have been delayed by the dispute. We recognize that there is a tremendous backlog of work to be accomplished, and Regions need to prioritize which projects to address. Obviously, those projects that most directly will help the Agency meet its strategic goals and objectives such as NPL construction completions, should receive higher consideration.

Regions should apply the revised Navy Principles, which are ready to implement, to RODs and Federal Facility Agreements/Interagency Agreements (FFAs/IAGs). We understand that the Army and the Defense Logistics Agency (DLA) will use the Navy Principles, as well. Regions should also consider, on a site-specific basis, alternate language for RODs and FFAs/IAGs that the Air Force may propose. (See Attachment 2). We have been told that as a result of the post-ROD resolution, DoD will suspend its 72-hour review requirement for RODs and FFAs/IAGs that conform to either the Air Force or Navy Principles. This should expedite approvals. We also understand that DoD will suspend or modify any of its current policies that are inconsistent with these Principles.

As you can see in Attachment 1, the Navy Principles provide extensive discussion and direction regarding the regulatory oversight role in the remedy implementation phase, including requirements for operation and maintenance of the remedy (including any engineered and non-engineered portions) and developing RODs, Remedial Designs, Remedial Action Work Plans, documents memorializing remedial action completion, and FFAs/IAGs at Federal facilities on the National Priorities List. Given the collaboration with our offices and the Regions by the Navy and the Army in developing these Principles, we anticipate that you will find implementation to be straightforward.

While EPA did not work with the Air Force in developing its "Principles of Agreement for Performance-Based Records of Decision in Environmental Restoration" (and the details of how these Principles would apply in practice is not yet known), EPA agreed that our Headquarters and Regional offices would give full and fair consideration of the Air Force's Principles on a site-specific basis. Consistent with EPA's and the Air Force's responsibilities to ensure the long-term viability of land use controls and to enter into FFA/IAGs at NPL sites, Regions should work with the Air Force to address any issues of concern that may arise as you consider application of the Air Force's Principles in the development of a site-specific ROD. Issues of concern and solutions developed, if any, should be shared with our office contacts--Allison Abernathy of FFRRO and Sally Dalzell of FFEO. As we develop experience with the Air Force Principles, additional guidance will be provided.

As you know, CERCLA and the National Contingency Plan (NCP), as well as EPA's related policy and guidance, provide for a great deal of flexibility in remedy selection, implementation and operations and maintenance. As a program, we have also encouraged innovation to streamline the CERCLA processes to increase overall efficiency, reduce costs and expedite cleanup. There are a few basic tenets that must be met as we move forward with the Navy and Air Force Principles.

- Remedies must be consistent with CERCLA and the NCP. Consequently, whether remedies are developed using the Navy or Air Force Principles, when evaluated in their totality, they must meet the nine criteria established by the NCP.
- It is EPA's position that CERCLA does not authorize the Services to issue RODs unilaterally. Please advise us if you are aware of a situation where a Service intends to issue a ROD unilaterally.
- Primary documents, described in existing FFAs/IAGs, are enforceable. At installations with no FFA/IAG, it is our expectation that, at a minimum, the final remedial design document will be subject to EPA review and approval along with the remedial action workplan, consistent with the 1988 EPA/DOD Model IAG.

- Based upon our current familiarity with the Navy Principles, these principles should be used as a point of departure at this time in any discussions with Federal agencies and the Services, including the Air Force. The Navy Principles articulate the minimum criteria for what to include in a ROD, Remedial Design (RD)/Remedial Action Work Plan for Institutional Controls (ICs), and for all post-ROD documents from DoD. Although a ROD, RD/Remedial Action Work Plan does not have to exactly reflect the Navy Principles, it is our expectation that they will provide substantially similar information, requirements, objectives, etc., as is described in the Navy Principles' "General Procedures."
- Based on our experience at several sites, we expect that the Air Force will propose placing all the IC detail directly into the ROD. This approach may work well at sites where the facility has an existing and effective facility-wide system to implement and monitor the necessary land use control system and the IC requirements are simple and unlikely to change with time. At a minimum, the IC detail in the ROD should be functionally consistent with the ROD and RD IC elements described in the Navy Principles.
- If a Service proposes to eliminate post-ROD documents such as the Operation and Maintenance Plan and a Document Memorializing Remedial Action Completion, Regions should consider this only where the requirements for the substantive information in these documents are detailed in the ROD or we are requiring the actions through an enforceable document elsewhere.<sup>1</sup> When placing the substantive requirements in the ROD, it is our expectation that EPA will continue to receive appropriate post-ROD documents for information purposes. In all cases, EPA must review and approve all post-ROD actions needed to ensure protective cleanups. However, EPA does not have to review and approve monitoring reports.
- Depending on site-specific circumstances it may not be possible to place all the necessary detail in the ROD (e.g, if there is a lack of comprehensive base-wide monitoring system for land use controls, the implementation actions are not decided at the time of the ROD, or if many areas require ICs and these areas have a range of different IC needs, etc.) In such instances, additional enforceable requirements subject to EPA's oversight authority would be required to ensure a protective remedy. It will also be necessary to provide mechanisms in the ROD for revisiting the effectiveness of the measures/objectives during the remedy implementation process (RD, RA or O&M stages).

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<sup>1</sup> For instance, in some FFAs such as the Region 9 March Air Force Base FFA, the Air Force is required at the completion of the remedial action to prepare a project closeout report that all requirements of the agreement have been completed. EPA and the State must concur on the Air Force's determination that the agreement has been satisfied.

- Where using only a ROD to describe ICs, Regions must ensure that only the institutional control remedy design details and not the engineering design details of the remedy are included in the ROD. The engineering details would ordinarily be contained in the Remedial Design (RD). The engineering requirements for the remedy must still be described in a separate RD.
- Regions should work to reduce document size, review time, and revisions, whenever and wherever possible.
- It is EPA's position that EPA must concur on documentation for site close-out. The scope and terminology for such documentation are to be considered by an EPA-DoD task force. The task force will examine potential consolidation and streamlining of close-out and de-listing documents. In the meantime, Regions should accept Remedial Action Completion Reports or documents containing equivalent information.

Please continue to coordinate closely with our office contacts – Allison Abernathy of FFRRO and Sally Dalzell of FFEO – on IC language prior to selecting a remedy and signing all draft and draft final Federal Facility RODs and Institutional Control Remedial Designs until further notice. Please allow two weeks review time at headquarters, although we expect to complete our review in much less time. If you have questions on how to proceed, please contact Allison Abernathy at 703-603-0052 or Sally Dalzell at 202-564-2583.

#### Attachments

cc: Marianne Horinko, Office of Solid Waste and Emergency Response  
 JP Suarez, Office of Enforcement and Compliance Assurance  
 Tom Dunne, Office of Solid Waste and Emergency Response  
 Barry Breen, Office of Solid Waste and Emergency Response  
 Steven Shimberg, Office of Enforcement and Compliance Assurance  
 Susan Bromm, Office of Site Remediation Enforcement  
 Robert Springer, Office of Solid Waste  
 Mike Cook, Site Remediation and Technology Innovation  
 Linda Garczynski, Office of Brownfields Cleanup and Redevelopment  
 Stephen Luftig, Land Revitalization Group  
 Earl Salo, Office of General Counsel  
 Federal Facility Leadership Council

Attachment 1 for EPA's Guidance on the Resolution of the Post-ROD Dispute 11/25/03:  
 EPA Response Letter to DoD's Post-ROD Principles, October 24, 2003  
[http://www.epa.gov/swerffrr/pdf/horinkopost\\_rod.pdf](http://www.epa.gov/swerffrr/pdf/horinkopost_rod.pdf)

Attachment 2 for EPA's Guidance on the Resolution of the Post-ROD Dispute 11/25/03:  
 DoD Principles and Procedures for Specifying, Monitoring, and Enforcement of Land  
 Use Controls and Other Post-Record Of Decision (ROD) Action, October 2, 2003  
[http://www.epa.gov/swerffrr/pdf/post\\_rod.pdf](http://www.epa.gov/swerffrr/pdf/post_rod.pdf)